SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

APRIL TERM, 1966

No. 1274

BEAUFORT CONCRETE COMPANY, PETITIONER,

versus

ATLANTIC STATES CONSTRUCTION COMPANY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Beaufort Concrete Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on October 5, 1965, for which a petition for a re-hearing was denied on February 1, 1966.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit (*infra,* Appendix A, Page 1) is reported at 252 F. (2d) 460.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 5, 1965 (*infra,* Appendix A, Page 11). Rehearing was denied on February 1, 1966 (*infra,* Appendix A, Page 17). The jurisdiction of the Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals for the Fifth Circuit sanction a departure from the accepted and usual course of judicial proceedings on the part of the United States District Court for the Southern District of Georgia by affirming the District Court's holding that plaintiff's counter-affidavits submitted in opposition to the defendant's motion for Summary Judgment were inadmissible when the District Court did not announce to counsel at the time of the hearing its ruling on the admissibility of plaintiff's counter-affidavits and in fact directed that they be handed to the Clerk as offer of proof and permitted argument based upon the affidavits, thereby leading plaintiff's counsel to believe that they were being considered and causing plaintiff's counsel to offer no further excuse, nor to request a continuance nor to offer further testimony which was available?

2. Did the Circuit Court of Appeals for the Fifth Circuit sanction a departure from the accepted and usual course of judicial proceedings on the part of the United States District Court for the Southern District of Georgia by affirming the District Court's granting of Summary Judgment to the defendant when the Court was apprised

that there was relevant evidence which the plaintiff would tender on trial of cause which would make a genuine issue of fact; and when defendant's affidavits, even considered alone, showed genuine issues of fact existed?

3. Did the Circuit Court of Appeals for the Fifth Circuit err in sustaining the District Court's finding that the decision of the engineer was final and binding based upon the decision of the Georgia Court of Appeals in *State Highway Dept. v. McDougald Construction Company*, 1939, 189 Ga. 490, 6 S. E. (2d) 570, and thereby erroneously misapply and extend the finality of the engineer's decision as between owner and contractor to the authority to place blame for defect as between the contractor and a materialman?

STATUTES INVOLVED

Rule 56 (e) of Federal Rules of Civil Procedure.
Rule 56 (f) of Federal Rules of Civil Procedure.
Rule 6 (d) of Federal Rules of Civil Procedure.

STATEMENT

In September, 1960, the defendant, Atlantic States Construction Company, a Georgia Corporation, entered into a general contract with the Georgia Ports Committee for the construction of docks and warehouses at The Garden City Terminal near Savannah, Georgia. On June 13, 1961, Atlantic States issued to the plaintiff, Beaufort Concrete Company, a purchase order for certain ready-mixed concrete required for the performance of the contract between Atlantic States and the Georgia Ports Committee. Pursuant to this contract, the plaintiff furnished to the defendant ready-mixed concrete and other materials which it alleges have a value of Two Hundred Ninety-one Thousand Eight Hundred Thirteen and 07/100 ($291,813.07) Dollars and has been paid by the defendant only the sum of Two

Hundred Four Thousand Two Hundred Ninety-nine and 98/100 ($204,299.98) Dollars, leaving due and owing the sum of Eighty-seven Thousand Five Hundred Thirteen and 09/100 ($87,513.09) Dollars.

This action to recover the balance due the plaintiff, Beaufort Concrete Company, was commenced in the Court of Common Pleas for Beaufort County, South Carolina, in April, 1962. It was removed by the defendants to the United States District Court for the Eastern District of South Carolina because of diversity of citizenship of the parties. Upon motion of the defendant, the action was then transferred to the United States District Court for the Southern District of Georgia, Savannah Division, for the convenience of parties and witnesses and in the interest of justice under Section 1404 (a) Title 28 U. S. C. A.

The defendant by its Answer denies that it owes the plaintiff anything, alleging that certain of the ready-mixed concrete furnished by the plaintiff failed to meet the requirements of the plans and specifications of the prime contract, was rejected by the engineer-architect and that this decision of the engineer-architect is final and binding on all the parties.

The defendant by its motion of October 19, 1963, moved for a Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure on the grounds that there was no genuine issue as to any material fact. Prior to the hearing the plaintiff presented to the defendant and to the Court its affidavits in reply to defendant's motion of Summary Judgment (R. 95-126). The defendant moved that these not be considered on the grounds that they were not served prior to the date of hearing under Rule 56 (c) of the Rules of Civil Procedure. Judge F. M. Scarlett did not rule on this motion and during the argument on the motion for Summary Judgment allowed the plaintiff to refer to and

quote from its affidavits which were before the Court. It was not until the receipt of the printed record that the plaintiff knew of the notation made by the Court on the original affidavits (R. 126). By his Order of February 7, 1964, Judge F. M. Scarlett granted the defendant motion for Summary Judgment. From this Order the plaintiff appealed to the United States Court of Appeals for the Fifth Circuit which by its decision dated October 5, 1965, affirmed the judgment of the District Court and by the Order dated February 1, 1966, denied the plaintiff's petition for a rehearing. It is this decision that the petitioner now seeks to have this Court review.

REASONS FOR GRANTING THIS WRIT

It was the duty of the District Judge to rule upon the admissibility of the plaintiff's counter-affidavits when they were presented at the hearing on the defendant's motion for Summary Judgment. Had he announced his refusal to admit the affidavits, plaintiff's counsel could have asked for an enlargement of time and made a showing that the failure to act was the result of excusable neglect under Rule 6 (b); or could have requested a continuance or extension of time under Rule 56 (f) or could have submitted oral testimony of a witness present at the hearing under Rule 56 (e). The District Court by ordering the counter-affidavits handed up to the Clerk of Court and by allowing counsel for both parties to argue fully on the contents of the affidavits lulled counsel for plaintiff into believing that the Court had permitted the serving of the counter-affidavits on the date of the hearing as it had a right to do under Rule 6 (d) of the Federal Rules of Civil Procedure and that the counter-affidavits were being fully considered.

The Court in its written order dated February 7, 1964, gave no indication of its ruling on the admissibility of the

plaintiff's counter-affidavits and it was not until the printed record in the appeal to the Circuit Court of Appeals for the Fifth Circuit was obtained that plaintiff knew that the Court had endorsed upon the back of the original counter-affidavits filed with the Clerk, the notation that the affidavits were not secured till the case was determined by the Court at the conclusion of argument, which notation was erroneous.

It was the duty of the presiding judge at the hearing on the motion for Summary Judgment to make a clear ruling on the admissibility of the plaintiff's counter-affidavits and his failure to do this was prejudicial to the plaintiff and caused the plaintiff to fail to make additional motions or offer additional evidence. By its proceedings, the District Court has denied the plaintiff his right to have the issues of fact tried and determined by a jury.

Summary Judgment is a drastic remedy and should be temperately and cautiously used. *Carantyas v. Iowa Mutual Insurance Co.*, C. A. 5th 1956, 235 F. (2d) 193. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test out, in advance of trial by inquiring and determining whether such evidence exists. *Whitaker v. Coleman*, C. C. A. 5th 1940, 115 F. (2d) 305. Technicalities have no place in the Summary Judgment procedure. Where Court is apprised that there is relevant evidence which will be tendered on trial before jury which would raise issue of fact then Summary Judgment should not be granted. *Whitaker v. Coleman, supra.* In the instant case the Court knew and had before it the plaintiff's counter affidavits which clearly raised questions of fact.

The defendants own affidavit (Record Pages 59 and 89) shows that in the defendant's opinion the engineer's interpretation and application of the specifications was

wrong and, therefore, raise questions of fact for determination by a jury.

The case of *State Highway Department v. McDougald Construction Company,* 1939, 189 Ga. 490, 6 S. E. (2d) 570 and the other cases cited thereunder by the District Court all deal with the engineer's decision on work wholly performed by the contractor where there is a dispute between the contractor and the owner. In the present case the dispute is between the materialman and the contractor and the rejection of the completed work does not make it *prima facie* the materialman's fault. The defendant contractor was responsible for the handling, placement, finishing and curing of the ready mixed concrete (Pages 86 and 87 of Record). There is evidence that the contractor added water to the concrete. All of these factors, controlled by and the responsibility of the contractor, affect the emplaced strength of the concrete. The engineer's decision as to the concrete poured on July 1st and July 5th was based solely on an analysis of cores or samples taken from the completed structure (Page 53 of Record). No defect was found in the material supplied by the plaintiff on those days, but only after it was emplaced for which the defendant had the greater responsibility.

The general rule that the engineer's decision is binding upon the parties is not applicable in this case since that decision was only that the owner refused to accept certain completed work from the defendant-contractor and did not touch upon whether this was the responsibility of the contractor or the material supplier. This is a question which should be determined upon a full trial of the case.

The defendants own affidavit (Record Pages 59 and 89) shows that in the defendant's opinion the engineer's interpretation and application of the specifications was

wrong and, therefore, raise questions of fact for determination by a jury.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Beaufort, S. C.,
April 26, 1966.